Employer Bulletin

Our Weekly News Digest for Employers

Friday, 14 May 2021

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Cases

Employment Relations Authority: Five Cases

Leave to join a second Respondent to proceedings granted

Mr Caird sought to have Mr Akeroyd joined to proceedings before the Employment Relations Authority (the Authority) and sought to have his original Statement of Problem amended. Build N'Style Limited (Build N'Style) was named as the Respondent in this determination.

The application referred to the letter contained in the offer of employment to Mr Caird dated 20 October 2019. The letter offered a position to Mr Caird at Stonewood Homes Southland Limited (Stonewood Homes). It was signed by Mr Akeroyd as Director of Stonewood Homes even though at the time, there was no company registered under that name.

Ms Foden, advocate for Mr Caird, claimed Mr Caird accepted the offer of employment and that he was provided with an employment agreement that named Build N'Style as the employer. Ms Foden said it was not clear whether the business traded as Stonewood Homes Limited, which was how the Respondent was described in the agreement.

Mr Pine, counsel for Build N'Style, opposed the Application for Joinder. He claimed that there was a considerable delay in applying for leave to lodge an amended Statement of Problem to join Mr Akeroyd to proceedings. Mr Pine did not dispute that Stonewood Homes did not exist at the time of the offer and that it had no association with Build N'Style therefore, Mr Pine argued that Stonewood Homes was incapable of making an offer.

Furthermore, Mr Pine argued that there was no offer and acceptance based on the letter dated 20 October 2019. He claimed that the employer was named as Build N'Style trading as Stonewood Homes. Payslips given to Mr Caird were headed up with Build N'Style's name and work time was recorded using an application in Build N'Style's name.

Section 221 of the Employment Relations Act 2000 allows the Authority or Employment Court to direct parties to be joined or struck out based on the substantial merits and equities of a case. The Applicant bears the onus of establishing the identity of the employer based on the balance of probabilities. In this case, there was a lack of clarity at the time of the offer of employment.

Mr Akeroyd signed the offer letter as Director of Stonewood Homes, which did not exist at the time of signing. A written employment agreement was provided which

named Build N'Style as the employer. It was provided before employment commenced but not signed by Mr Akeroyd for some time. The Authority held that it would need to ask an independent but knowledgeable observer who they believed could establish who the employer was.

The Authority stated if it were to hear evidence about the identity of the employer from parties other than the Respondent, it would possibly lead to further proceedings and increase costs for all parties. The Authority therefore held that the issues would be efficiently dealt with by joining Mr Akeroyd to proceedings. Leave to join Mr Akeroyd to proceedings was granted as well as the amendment of the Statement of Problem. Costs were reserved.

Caird v Build N'Style Limited [[2021] NZERA 118; 25/03/2021; H Doyle]

Employer unjustifiably disadvantaged and dismissed employee through insisting on a change in shifts

Mr Reeves-Crawford was employed by The Homegrown Juice Company Ltd (Homegrown) as a General Factory Worker from 29 May 2019 until December 2019. Mr Reeves-Crawford raised multiple grievances against Homegrown, claiming that he was disadvantaged during employment and unjustifiably dismissed.

Mr Reeves-Crawford claimed that while he was employed, he had attempted to raise many grievances with Homegrown but was ignored. Mr Reeves-Crawford claimed that Homegrown made variations to his employment agreement without his consent and had moved his day shifts to night shifts. Allegedly, he informed Homegrown that he could not work night shifts due to prior commitments. However, he was advised that his shifts would still change. When Mr Reeves-Crawford again raised this issue, he was told that there was no other work for him, and his employment effectively ended on 13 December 2019.

Homegrown rejected Mr Reeves-Crawford's allegations, stating that no grievances were raised by him during his employment that were ignored. Homegrown denied making unlawful variations to the employment agreement and had advised that it relied on clause 6.2 of the employment agreement to vary Mr Reeves-Crawford's shifts. The clause indicated that subject to the nature of work demands, the days and hours of the employee's work may vary significantly. Homegrown had also noted that Mr Reeves-Crawford was having problems with co-workers and they needed to move him to a different shift and had placed him in a different department.

Mr Reeves-Crawford had further evidence that he was given little or no training, despite requesting it, and that this had resulted in mistakes being made. He claimed that other employees had issues with him not knowing his job, and subsequently raised a bullying claim, which was ignored. Mr Reeves-Crawford had signed a letter dated 18 October 2019 for another incident agreeing that no further investigation was required. However, Mr Reeves-Crawford admitted that he felt he had no choice but to sign it under duress. He also claimed that he was not given the hours he was contracted for and was therefore underpaid.

Mr Dennis, General Manager of Homegrown, claimed that Mr Reeves-Crawford was a challenging employee to deal with. Mr Dennis strongly rejected the suggestion that the October 2019 letter was signed by Mr Reeves-Crawford under duress. He had been preparing to interview the parties when Mr Reeves-Crawford had come to his office to tell him the situation had been resolved. In following, Mr Dennis prepared the letter. The Employment Relations Authority (the Authority) was satisfied with this evidence.

Mr Dennis rejected the suggestion that Mr Reeves-Crawford suffered from a lack of training. He said he was employed as an Unskilled Factory Worker, with very little training required. Mr Brownie, Managing Director of Homegrown, rejected all claims of bullying and made it clear that Homegrown did not tolerate bullying in the workplace. Evidence had shown that Mr Reeves-Crawford worked varying hours and there were some weeks where he did not work the contracted hours at his own instigation, so was not paid for hours unworked.

According to Mr Dennis, Mr Reeves-Crawford had abandoned his employment and there had been no dismissal. He referred to a letter written on 19 December 2019, which indicated that Mr Reeves-Crawford was invited to attend a meeting on 23 or 24 December 2019. He said that Mr Reeves-Crawford had failed to turn up to the meeting because he needed to get legal advice even though he had already received it.

Despite Homegrown's claim that Mr Reeves-Crawford abandoned his employment. The letters they provided Mr Reeves-Crawford on 19 December 2019, 15 and 22 of January 2020 and corresponding texts indicated otherwise.

The Authority noted that the letters and texts had shown that Homegrown believed the employment agreement to be frustrated. The Authority held that Homegrown knew Mr Reeves-Crawford had thought he had been dismissed and Homegrown knew that the reason for this was because it was insisting on a change in shifts.

The Authority found no evidence that Homegrown had bullied Mr Reeves-Crawford. However, they had concluded that Mr Reeves-Crawford was unjustifiably dismissed and disadvantaged. Homegrown had not acted like fair and reasonable employer would have done.

The Authority ordered Homegrown to pay Mr Reeves-Crawford lost wages for a period of three months totalling $10,100 and a sum of $15,000 for compensation. Costs were reserved.

Reeves-Crawford v The Homegrown Juice Company Ltd [[2021] NZERA 82; 02/03/2021; G O'Sullivan]

Employer's decision to suspend and dismiss following employee's restraint of a young person upheld

Mr Church was employed by the Chief Executive, Oranga Tamariki – Ministry for Children (Oranga Tamariki) from July 2017 until he was dismissed on 29 August 2019. Mr Church claimed he was unjustifiably dismissed and that being suspended was an unjustified action by Oranga Tamariki which affected his employment to his disadvantage. Mr Church sought reinstatement, reimbursement of lost remuneration and benefits and compensation for humiliation, lost dignity, and injured feelings.

Oranga Tamariki said the decision to suspend Mr Church was procedurally fair and substantively justified. It said it conducted a full and fair disciplinary investigation into allegations arising from Mr Church's restraint of a young person on 29 June 2019.

When CCTV footage of the incident was analysed, Mrs Williams, Acting Residence Manager of Oranga Tamariki, initiated a disciplinary process with Mr Church for serious misconduct. After the disciplinary meeting on 26 July 2019, Mr Church was suspended on full pay pending the outcome of the disciplinary investigation. A few days later a letter was sent to Mr Church conveying Oranga Tamariki's preliminary decision that the disciplinary issues were substantiated. It also conveyed that Mr Church's actions amounted to serious misconduct for which he would be summarily dismissed.

Mr Bryce, Mr Church's representative, sent an email on 2 August 2019 expressing concern about the letter. Mr Bryce claimed that Mrs Williams was in the process of making a preliminary decision without all relevant information and that Mr Church did not have an opportunity to comment on the information.

The employment agreement provided that where there was a genuine ongoing risk to the safety of staff, tamariki or the organisation, Oranga Tamariki could require an employee to remain away from work on full pay while it conducted its investigation. Stated In the employment agreement, was that Oranga Tamariki must first consult the employee and their union representative.

The Authority accepted that Mr Church's employment was affected to his disadvantage by him feeling "*blindsided*" by being told to leave the workplace premises on 30 July 2019. However, it found that Oranga Tamariki was justified in its decision to suspend Mr Church. Oranga Tamariki had raised its concerns with Mr Church, and he had a reasonable opportunity to respond to the concerns. Oranga Tamariki then genuinely considered the response. Accordingly, no personal grievance under section 103(1)(b) of the Employment Relations Act 2000 arose from the decision to suspend him.

Whether a dismissal was justified is determined by assessing whether the employer's actions and how the employer acted at the time were what a fair and reasonable employer could have done in all the circumstances at the time. There was a submission on Mr Church's behalf that the investigation was limited to two expert opinions and the CCTV footage. There was no genuine effort to interview staff or the young people. However, the Authority did not accept this caused the investigation to be insufficient. The Authority held that it would have been inappropriate to involve the young people.

Mr Church also questioned whether expert opinions about the incident should have been sought before any concern was raised with him. He said that three weeks passed before he was made aware of these concerns. The

Authority found that Oranga Tamariki had properly sought expert reviews of Mr Church's use of restraint on a young person which took time to complete, no prejudice arose for Mr Church because of this.

Consequently, the Authority found that Oranga Tamariki did raise its concerns with Mr Church before dismissing him. The Authority found that Oranga Tamariki gave Mr Church a reasonable opportunity to respond to its preliminary decision.

Mrs Williams said that restraint of a young person in breach of guidelines amounted to serious misconduct. Mr Church had breached Oranga Tamariki's code of conduct and regulation 22 of the Oranga Tamariki (Residential Care) Regulations 1996. Oranga Tamariki was permitted under Mr Church's employment agreement to terminate employment if serious misconduct was substantiated. The disciplinary policy included a definition of what constituted serious misconduct and said that it was unacceptable conduct that undermined, damaged or destroyed the trust and confidence in the employment relationship. Examples provided included an action that resulted in, or may have resulted in, harm to a young person in Oranga Tamariki's care.

Oranga Tamariki's actions were what a fair and reasonable employer could have done at the time. The Authority found that Oranga Tamariki was justified in its decision to dismiss Mr Church. Costs were reserved.

Church v The Chief Executive, Oranga Tamariki – Ministry for Children [[2021] NZERA 104; 18/03/2021; P Cheyne]

Privileged material ordered to be taken out of amended Statement of Problem

Woop Limited (Woop) sought an order directing Mr Taylor to amend and refile his amended Statement of Problem to remove material (the material) which disclosed part of, or related or referred to, privileged discussions between the parties and subsequent in-person and written negotiations. Mr Taylor claimed the material did not attract privilege or, if it did, that it was in the interests of justice to set aside any privilege.

The Court of Appeal in *Morgan v Whanganui College Board of Trustees* established the essential requirements for without prejudice communications to be afforded protection. These include an existence of agreement, existence of negotiations or a difference and that the dispute could result in litigation which could be affected by an admission.

The Employment Relations Authority (the Authority) was satisfied an agreement was formed when Woop asked Mr Taylor to enter a without prejudice conversation and Mr Taylor subsequently agreed. Woop's emails to Mr Taylor following the meeting were clearly marked as without prejudice and the Authority was satisfied the contents of those emails were protected by privilege. Mr Taylor did not head his emails in the chain similarly. Mr Taylor claimed that the lack of heading or reference to without prejudice in the emails carved out the communications from any privilege. The Authority did not accept this argument.

Mr Taylor submitted that when Woop initiated the without prejudice communications there was no dispute or employment relationship problem between the parties. It was clear to the Authority a serious problem had arisen in the employment relationship which needed to be resolved and that the parties agreed their communications should be protected for that purpose. If Mr Taylor did not accept the settlement proposal, then Woop would have commence a performance management process which could result in disciplinary action. Personal grievance claims could have then arisen from such a set of circumstances which is what occurred. Therefore, the Authority was satisfied the dispute could result in litigation which could be affected by an admission.

Mr Taylor argued that privilege should be lifted because the material contained a threat and was relevant to his personal grievance of unjustified constructive dismissal. The threat referred to was Woop's characterisation of the performance management process as "*not very nice*", if Mr Taylor did not accept the settlement proposal and that the settlement offer was made on a "*either/or*" basis. It was accepted that Woop presented Mr Taylor with a choice and indicated its preference by outlining negative aspects of the alternative. However, given the parties' clear agreement to enter without prejudice negotiations, it was not a communication which would justify admissibility.

Consideration had been given to whether, having found the communications were privileged, the Authority should exercise its equity and good conscience jurisdiction and admit the material. If this occurred, all communications between the parties, which Mr Taylor sought to rely on to support his personal grievances, would be before the

decision maker for consideration. Having considered those communications individually and in the broader context of Mr Taylor's claims, the Authority was not satisfied that the material was of such weight to order it admissible.

My Taylor was ordered to amend and re-file his amended Statement of Problem by removing the material. Woop was entitled to a consideration of costs. The parties were encouraged to resolve the issue of costs between them.

Taylor v Woop Limited [[2021] NZERA 136; 09/04/2021; M Urlich]

Vulnerable employee unjustifiably dismissed when not brought over on same terms as previous employer

Mr Hau worked for a family run café for eight years as a Manager and Barista. The café was sold to SA & AC Lester Limited (SA & AC) a company owned by Mr Lester and Mrs Lester as an ongoing business called the Cosy Café, with a settlement date of 13 November 2019. The sale and purchase agreement gave the purchaser sole discretion to engage with the vendor's staff on no less favourable terms than those they were employed by. Despite, SA & AC offering employment to Mr Hau, the parties were unable to reach an agreement on terms.

Mr Hau claimed that SA & CA unjustifiably dismissed him by engaging in unfair bargaining by offering ongoing employment that contained a trial period and had no provision for continuity of accumulated service benefits. Furthermore, Mr Hau asserted that Mr Lester and Mrs Lester ignored a representation that he was covered by Part 6A of the Employment Relations Act 2000 (the Act).

Section 69A of the Act, provides protection to "*categories of employees*" detailed in Schedule 1A including employees who provide "*food catering services*," where continuity of employment is affected by a restructuring. Section 69A specifies that if the employee is protected, the protection conferred gives the employee the right to elect to transfer to the other company as employees on the same terms and conditions of employment. The Act provides that specific categories of employees considered vulnerable, are statutorily able to maintain the choice of continuity of employment on the same terms and conditions when a business is sold.

The Act provides no specific guidance on what an employee who provides food catering services is. The Employment Relations Authority (the Authority) and Employment Court (the Court) had not yet addressed this matter in the specific context of an employee of a food business dealing directly with the public in a café. The Authority considered the approach in *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd*. This case suggested that to determine the nature of the type of service, the Court needs to consider the overall nature of the employee's role in the context of the total work activity rather than engaging in a minute dissection of individual components of the employee's work.

The Authority also considered the decision of *Hughes v Upper Hutt Cosmopolitan Club* where the Authority had to consider whether a couple operating a restaurant in a club provided food catering services, were within the scope of Schedule 1A. The Authority took a more expansive approach after determining that whilst the employees were not vulnerable employees or required to be, the couple involved being an executive chef and restaurant manager did provide those services to the Club so that its catering needs were met and thus fell within the scope of Schedule 1A. The Authority, in finding the employees were vulnerable in Hughes, noted that "*Parliament has chosen through a considered process to cover certain categories of work, not certain categories of employees*".

Having regard to case law and applying section 69A of the Act to Mr Hau's situation, the Authority found that the term "*food catering services*" has always restricted to a business solely focussed upon providing food for events or special occasions. Food catering in the modern economy has a much wider provider base and has arguably a wider meaning and is not closer to the simple provisions of food services that may be consumed off the premises in a variety of formal and informal settings.

Therefore, the Authority found that Mr Hau's positions due to the comprehensive nature of the service the café provided was capable of being included in the definition of an employee providing "*food catering services*" and that this category was capable of being understood in a wider sense in the modern economy. Therefore, Mr Hau should have been offered continued employment on the same terms and conditions as he had with his former employer.

Having established that Mr Hau should have been afforded ongoing employment on the same terms and conditions, Mr Hau was entitled to remedies for what amounted to an unjustified dismissal. The Authority awarded Mr Hau

$4,000 in lost wages and $8,000 for hurt and humiliation. Mr Hau represented himself and did not incur any legal costs. SA & AC was ordered to pay Mr Hau the filing fee of $71.56.

Hau v SA & AC Lester Limited [[2021] NZERA 109; 06/04/2021; D Beck]

For further information about the issues raised in this week's cases, please refer to the following resources:

Discipline

Full and Final Settlements

Suspension

Performance Management

Vulnerable Employees

Employer News

Economic resilience provides more options in Budget 2021

Securing the recovery and investing in the wellbeing of New Zealanders is the focus of Budget 2021, Grant Robertson told his audience at a pre-budget speech in Auckland this morning.

"The economy has proven resilient in response to COVID-19, due to people having confidence in the Government's health response to keep them safe. Unemployment has continued to trend down, an extra 32,000 jobs have been created in the six months to March and business and consumer confidence is increasing as our vaccine rollout is ramping up and we are carefully opening up our borders."

"We can't take the recovery for granted. Further waves of COVID-19 around the world underline that we are still in a highly volatile and uncertain global environment. There are still sectors and regions in New Zealand struggling to deal with the impacts of the pandemic. We have also taken on considerable debt to support New Zealanders lives and livelihoods through COVID-19.

To read further, please click the link below.

New Zealand Government [10 May 2021]

Govt to deliver lower card fees to business

Commerce and Consumer Affairs Minister David Clark has today announced the Government's next steps to reduce merchant service fees, that banks charge businesses when customers use a credit or debit card to pay, which is estimated to save New Zealand businesses approximately $74 million each year.

"Pre COVID, EFTPOS has been the main way Kiwis pay for goods and services, and this is fees-free for retailers. Increasingly, however, consumers are favouring contactless debit and credit cards," David Clark said.

"The high cost of these fees puts added financial pressure on businesses at a time when they are dealing with the economic impacts of COVID-19 "Reducing the merchant service fees that New Zealand businesses are being charged is a priority for this Government, and critical to the recovery of the economy."

"Currently unregulated, New Zealand's merchant service fees are set much higher than they are in Australia and add significant overhead for retailers, who often pass those costs onto consumers through higher prices," David Clark said.

Following feedback from a recent consultation period, a Retail Payments Systems Bill will be introduced later this year to:

- require reductions in interchange fees as soon as possible
- enable direct intervention by the Commerce Commission using a broad suite of powers to regulate different participants in the retail payment system
- introduce a disclosure and reporting requirement to enable the Commerce Commission to monitor the retail payments system.

To read further, please click the link below.

New Zealand Government [12 May 2021]

Māori business identifier goes live

For the first time Māori businesses can identify themselves Māori business on the New Zealand Business Number register.

By registering as a Māori business they will benefit from the opportunities provided by the NZBN, doing business with confidence and certainty, connecting and interacting more easily, with more accuracy, saving time and money.

Government can also start to understand the contribution that Māori businesses make to the economy, make it easier for investment or collaboration and help better measure the effectiveness of government policies for Māori. Government and non-government agencies will no longer have to rely on surveys to get up-to-date information on Māori economic activity.

It has been difficult to accurately understand the needs and successes of small to medium sized Māori businesses. Ross van der Schyff, General Manager Business & Consumer, MBIE, says "If government wants to successfully support Māori businesses we need better data to better understand them. This is the first time that we can measure Māori business and economic activity in the government data system."

Ministry of Business, Innovation and Employment (MBIE) and Te Puni Kōkiri have been working alongside the leaders of New Zealand Māori Tourism, Federation of Māori Authorities, Poutama and the Māori Women's Development Inc. on this initiative.

"The old adage goes "you can't manage what you don't measure"," says Pania Tyson-Nathan, Chief Executive of NZ Māori Tourism.

"Without good, reliable Māori business data, it is difficult to properly give effect to Māori economic development. Identifying Māori businesses through the NZ Business Number register offers a simple, yet effective way to collect data about Māori commercial enterprise in Aotearoa New Zealand. For an organisation like NZ Māori Tourism, having good, reliable Māori business data will enable us to tailor and direct our support for the Māori tourism sector to where it is most needed."

To read further, please click the link below.

New Zealand Government [12 May 2021]

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Consultation opens on improving regulation of engineers

The Ministry of Business, Innovation and Employment (MBIE) has opened consultation on options to improve the regulation of the engineering profession.

"While the majority of engineering professionals in New Zealand are skilled and highly professional, there are gaps in the system for regulating the profession that need to be addressed," says Amy Moorhead, MBIE's Building Policy Manager.

"MBIE is consulting on options to improve the public's confidence in the profession by ensuring engineers operating in New Zealand are competent, behave ethically, and are held to account."

The proposal being consulted on is to establish:

- A new registration scheme for all engineers, to ensure a base level of professionalism.
- A new licensing regime, to regulate who can carry out or supervise engineering work in specified practice fields that have a high risk of harm to the public.

"We propose that anyone providing professional engineering services will need to be registered. Currently, there is a lack of clarity around who can call themselves an engineer, and this makes it difficult for the consumers to know whether an engineer is qualified to practice.

To read further, please click the link below.

 New Zealand Government [12 May 2021]

Helping our farmers look after themselves and their flock

Farmers are great at looking after their animals and their farms, but they also need to look after their most important asset on the farm: themselves and those who work in the business.

That's the message from ACC and Farmstrong as farmers all over New Zealand get ready to meet the workload of another demanding winter season.

Agriculture is New Zealand's biggest export earner but it's also one of our most high-risk industries.

In 2020, there were 22,796 farm-related injury claims accepted which came at a cost of $84 million to help people recover.

To read further, please click the link below.

 ACC New Zealand [11 May 2021]

Lower job security linked to lower life satisfaction

People who feel their employment is insecure are more likely than other employed people to rate their overall life satisfaction poorly, Stats NZ said today.

To read further, please click the link below.

 Statistics New Zealand [12 May 2021]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First reading; Referral to select committee; Select committee report, Consideration of report; Committee stage; Second reading; Third reading; and Royal assent.

Bills open for submissions: 7 Bills

7 Bills are currently open for public submissions to select committees.

Social Security (Subsequent Child Policy Removal) Amendment Bill (19 May 2021)

Mental Health (Compulsory Assessment and Treatment) Amendment Bill (19 May 2021)

Inquiry into congestion pricing in Auckland (20 May 2021)

Sunscreen (Product Safety Standard) Bill (26 May 2021)

Incorporated Societies Bill (28 May 2021)

Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill (28 May 2021)

Education and Training Amendment Bill (25 June 2021)

Overviews of bills - and advice on how to make a select committee submission - available at:

https://www.parliament.nz/en/pb/sc/make-a-submission/

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz

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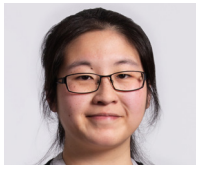

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